



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NO: 2015/5890

- (1) REPORTABLE: **YES**
 (2) OF INTEREST TO OTHER JUDGES: **YES**
 (3) REVISED.

..... **23 May 2016 SIGNATURE**

In the matter between:

FIRSTRAND BANK LTD

Applicant

And

KRUGER, NICO

First Respondent

KRUGER, NICO: NO

Second Respondent

KRUGER, THOMAS JOHANNES: NO

Third Respondent

HEPBURN, DAVID: NO

Fourth Respondent

J U D G M E N T

SPILG, J

INTRODUCTION

1. During the unopposed court hearings there were a number of applications brought on long form notice of motion by financial institutions against defaulting credit receivers in relation to credit agreements for home loans and motor vehicle finance. Previously they all had been postponed by my brother Coppin J in order for the plaintiff's to file supplementary affidavits dealing with hearsay allegations..
2. There were a number of other cases on the unopposed motion roll which involved the same issue.
3. The cases before me can be divided into those where there is some suggestion that the deponent has personal knowledge of certain of the essential allegations and those where on an overview of the founding affidavit the deponent has not set out enough facts to demonstrate personal knowledge.
4. The present case is an example of the latter.
5. The claim was brought on notice of motion for payment of an amount of just over R2.6 million together with interest and the hypothecation of the immovable property which was provided as security for the loan. In addition the bank sought an order rectifying the applicable interest rate from prime less 1.25% to prime less 1%.
6. The affidavit was deposed to a Mr Bongani Madliwa who describes himself as a commercial recoveries manager at the bank.

The grounds on which the facts contained in the affidavit are said to be admissible can be found in paragraphs 2 and 3, which read:

"The facts contained in this affidavit fall within my personal knowledge, save where otherwise stated or where the contrary appears from a context, are true and correct."

Where I rely on information obtained by and from individuals, including representatives of the applicants I believe such info to be true and correct."

7. Insofar as proof of the agreement is concerned the deponent attached a copy of the credit facility agreement and states that the bank was represented by Ms Shaw and Mr Midlane.

There is no confirmatory affidavit filed by these officials either in relation to the conclusion of the agreement or that they had made a mistake when inserting the interest rate. Furthermore the deponent does not identify from whom he obtained any of the information relied upon: It is therefore not possible to ascertain which parts of the evidence presented are within the deponent's own knowledge and which was conveyed to him by his unnamed sources.

CLAIM FOR RECTIFICATION

8. The only statements contained in the affidavit regarding the alleged error in determining the interest rate are to be found in the following paragraphs:

"14. The cost of credit section in the agreement erroneously records the Concession rate as -1.25% and not 1%.

15. However the facility graph (appearing in the agreement) correctly records the concession rate as -1%.

16. The actual concession rate calculated and charged on the Facility was - 1% as recorded in the Facility graph.

17. The incorrect concession rate was occasioned by a common error of the parties due to a mistake in the drafting and completion of the agreement, and the parties signed the agreement in a bone fide but mistaken belief that it recorded the true Concession Rate."

9. It is evident that only Ms Shaw or Mr Midlane can provide direct evidence to support a rectification of the agreement. Their affidavits are not attached and there is no evidence to indicate why either of the two officials was unable to depose to a confirmatory affidavit.
10. Moreover an allegation of fact in an affidavit which in truth comprises no more than information that others may have provided cannot be elevated to real evidence simply because the deponent, under a standardised statement at the commencement of the affidavit, believes it to be true and correct.
11. The difference of .25% in the calculation of interest affects the correct calculation of the current outstanding amount and the rate of interest from the date of judgment until the judgment debt is paid either prior to a sale in execution or pursuant to execution. This affects both the rights of other creditors and the rights of the debtor to receive any surplus amount arising from a sale. It also compromises the certificate of indebtedness despite the clause in the loan agreement which provided that it constituted *prima facie* evidence of the

outstanding amount. See *Senekal v Trust Bank of Africa Ltd* 1978 (3) SA 375 (A) at 383A-C.

12. *Adv Fine* on behalf of the applicant has not suggested a basis upon which the rules of evidence may be relaxed. I am unaware of any that would allow this court to receive the statements contained in these paragraphs into evidence. Accordingly no case is made out on the papers for rectifying the agreement.

SUFFICIENCY OF OTHER ESSENTIAL EVIDENCE

13. The aspect of rectification just dealt with also brings into focus the basic difference between allegations pleaded in a summons and those which must be deposed to under oath in motion proceedings.

Default judgment will be granted in the former case where the cause of action is properly set out in the pleadings (subject to such rules or practices which require an affidavit when applying for judgment) whereas in the latter affidavits replace both the pleadings and the essential evidence that would be produced at trial through leading *vive voce* evidence.

It follows that in motion proceedings an allegation of fact can only be made through admissible evidence contained in the affidavits filed.

See generally *Swissborough Diamond Mines (Pty) Ltd and Others v Government of the Republic of South Africa and Others* 1999 (2) SA 279 (W) at 323F-324E; *Triomf Kunsmis (Edms) Bpk v AE & CI Bpk en Andere* 1984 (2) SA 261 (W) at 269G – H and *Foize Africa (Pty) Ltd v Foize Beheer BV and Others* 2013 (3) SA 91 (SCA) at para 30; see also illustration of hearsay in *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency, and Others* 2014 (1) SA 604 (CC) at para 94 and compare *Executive Officer, Financial Services Board v Dynamic Wealth Ltd and Others* 2012 (1) SA 453 (SCA) at para 16

14. The present case also highlights the practice of attorneys instituting claims of this nature by way of motion rather than action proceedings. The tendency is to apply the same process of stereotypical allegations in a template type format without obtaining the real evidence from the client's employees or other representatives who were actually involved in the matter. There was even a stage where a legal typist at the applicant's firm of attorneys would depose to the founding affidavit.
15. But for the application for rectification, and provided the deponent was in custody and control of the various documents relied upon there may have been sufficient

evidence to prove the conclusion of the agreement, the suretyship undertakings and the despatch of the relevant notice under the National Credit Act 34 of 2005 (*'the NCA'*).

16. However with regard to the calculation of the outstanding debt, in the present case only the certificate of indebtedness was signed by the deponent and there is no other evidence indicating that he was involved in attempts to collect the amount outstanding or had personally engaged any of the respondents.
17. The previous court hearing this matter considered that the deponent to the founding affidavit did not have personal knowledge of all the facts relevant to the cause of action and that essential allegations in the affidavit constituted hearsay.

In this regard the only basis on which the deponent claimed that the facts might be within his direct knowledge was through his position as a commercial recoveries manager; not that he had actually been involved in any attempt to recover the alleged debt or had actually accessed any of the bank's records. The fact that he relied on others to provide him with information puts into question whether any of the essential facts were gathered by him through personally accessing and considering the bank's records of the transaction and the debits and credits raised on the principle debtors loan account.

18. In *Rees and another v Investec Bank Ltd* 2014 (4) SA 220 (SCA) at para 14 the court found that the deponent, who was the recoveries officer, had been involved in attempts to collect the debt, had perused the file and had personally corresponded with the attorneys representing the defendants in respect of the arrear account. She had also written the letters of demand and had received responses setting out the sureties' defences. In the context of the case the Supreme Court of Appeal (*'SCA'*) held that it was unimportant that the deponent had not been present when the suretyship agreement was concluded.
19. It may be said that the requirement for summary judgment allows a degree of flexibility in regard to the rules of evidence since the deponent to the application for summary judgment, in terms of rule 32(2) of the Uniform Rules of Court, is only required to verify the cause of action by swearing positively to the facts.
20. Nonetheless a body of case law has built up in summary judgment proceedings which accept that where a person is in control of the relevant files and is directly involved in the matter at hand, whether having engaged the defendant directly or by correspondence without come-back, then that person qualifies to depose to an affidavit verifying the facts.
21. This approach, in respect of proving the documents relied upon, is consistent with the situation where a subpoena *duces tecum* is served only on the person who

has custody and control of the files of a legal entity is called on to produce them in trial proceedings.

In such a case the documents on production in court by the person subpoenaed become evidence of what they purport to be although not as to truth of content.¹

22. In *Barclays National Bank Ltd. v. Love*, 1975 (2) SA 514 (D) at pp. 516H-517A Miller J at the time said in relation to an affidavit supporting summary judgment:

'We are concerned here with an affidavit made by the manager of the very branch of the bank at which overdraft facilities were enjoyed by the defendant. The nature of the deponent's office in itself suggests very strongly that he would in the ordinary course of his duties acquire personal knowledge of the defendant's financial standing with the bank. This is not to suggest that he would have personal knowledge of every withdrawal of money made by the defendant or that he personally would have made every entry in the bank's ledgers or statements of account; indeed, if that were the degree of personal knowledge required it is difficult to conceive of circumstances in which a bank could ever obtain summary judgment. It goes without saying that a manager of a bank who claims to have personal knowledge of the extent to which a client has overdrawn his account must needs rely upon the bank records which show the amounts paid into his account and the amounts withdrawn by the client.'

23. It appears that the underlying premise of cases dealing with the adequacy of such affidavits in summary judgment proceedings is both the reliability and probative value of the evidence of the bank official, who by reason of the duties he or she is obliged to perform would in the ordinary course acquire personal knowledge of the current status of the credit receiver's account as well as have accessed the relevant bank records while performing such duties, and the reliability of the bank's records (by which I include the record of transactions on the account and the credit receiver's file records) and their probative value.

¹ In *S. v Volschenk*, 1970 (3) SA 502 (T) at 505 Boshoff J (at the time) said:

"A banker's books are from their very nature at best only secondary evidence of the original transactions from which they are compiled and which they purport to reflect. On the general principles relating to the law of evidence, the contents of a banker's books cannot be used testimonially in a court of law unless the contents thereof have been properly proved with the evidence of the person or persons who have direct knowledge of the transactions reflected therein."

Section 28 of the Civil Proceedings Evidence Act, 25 of 1965 in regard to entries in banker's books does not assist because the bank is a party to the proceedings. . The discretionary provisions of section 34(1)(a)(ii) read with subsection(2) might have application provided the foundation for its reception both under this Act and, in the case of electronic data, section 15(1) or (4) the Electronic Communications and Transactions Act 25 of 2002.

24. Self-evidently these line of cases commenced well before the introduction of the Law of Evidence Amendment Act 45 of 1998. Section 3 of the Act, and in particular for present purposes section 3(1) (c). The section has at its core base for the reception of what would otherwise constitute hearsay, the reliability and probative value of the evidence sought to be tendered².

In my view summary judgment cases are therefore of assistance in determining the extent to which hearsay evidence ought to be admitted in the present type of application where the respondent, despite being served, has not challenged the averments thereby rendering the nature of the proceedings unopposed for the purposes of section 3(1)(c)(i) and where all the other factors to be taken into account under sub-section (3) have already been positively dealt with, albeit in another context, in the summary judgment cases cited. Clearly I do not suggest that the same holds good in opposed matters or where the papers themselves put the probative value of the evidence or its reliability into doubt, as arises in the present case by reason of the order sought for rectification

25. Under the exceptions to the hearsay rule the inherent difficulties of producing every individual who dealt with the credit receiver and made each entry reflected in the account in question would in my view, together with the other factors already mentioned regarding probity and reliability, entitle an applicant credit grantor seeking judgment in an unopposed matter to rely on;

- a. the evidence of a person who exercises custody and control of the documents in issue to introduce them into evidence through the founding affidavit provided such allegation is made, or appears from the contents of the affidavit as a whole³, and provided the agreements are attached and

² Section 3(1)(c) of the Law of Evidence Amendment Act 45 of 1998 provides:

3 Hearsay evidence

(1) *Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless-*

....

- (c) *the court, having regard to-*
 - (i) *the nature of the proceedings;*
 - (ii) *the nature of the evidence;*
 - (iii) *the purpose for which the evidence is tendered;*
 - (iv) *the probative value of the evidence;*
 - (v) *the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;*
 - (vi) *any prejudice to a party which the admission of such evidence might entail; and*
 - (vii) *any other factor which should in the opinion of the court be taken into account, is of the opinion that such evidence should be admitted in the interests of justice.*

³ Love at 517A. Approved in respect of summary judgment proceedings in *Maharaj v. Barclays National Bank Ltd* 1976 (1) SA 418 (AD) at 424B-D

are alleged to be true copies⁴. This would usually be a bank manager or an official holding the position of a recoveries manager⁵;

- b. the evidence of a person who has personal knowledge of the current status of the credit receivers' account by reason of having access to the account and being involved in the present management of the account or collection process, in respect of the allegations contained in the founding affidavit regarding the current outstanding balance.

This would be subject to the terms of the agreement which may permit a certificate of indebtedness to constitute *prima facie* proof provided it is signed by a designated official at the financial institution and provided further that the court is otherwise satisfied that such person would, in the ordinary course, have personally accessed the records, accounts and other relevant records of the respondent and provided the certificate is otherwise reliable.

See generally Salduker JA in *Rees* at para 14; *Maharaj v. Barclays National Bank Ltd* 1976 (1) SA 418 (AD) at 424E-F and Wallis J (at the time) in *Shackleton Credit Management (Pty) Ltd v Microzone Trading 88 CC* 2010 (5) SA 112 (KZP) at para 13 approving the requirement in *Standard Bank of SA Ltd v Secatsa Investments (Pty) Ltd and Others* 1999 (4) SA 229 (C) at 235A – C that the deponent at least has personal knowledge of certain of the relevant facts;

- c. the evidence of a person who positively attests that notice was properly sent to the respondent under either section 129(1) or section 86(10) of the NCA.

26. In the present case the deponent while having the trappings of authority in the department does not claim to have been personally involved in the process of recovering the debt, let alone having personally accessed the bank's records, accounts or other relevant documents. As stated earlier the deponent left it unclear as to what he personally did and what information was provided to him by others or from where they in turn might have sourced it.

⁴ See rule 6(5)(b) and see also *Chiloane v Maduenyane* 1980 (4) SA 19 (W) at 20H-21A

⁵ *Rees* at para 14;

ORDER

27. Accordingly the papers are not in order and the applicant is obliged to file and serve on the respondents a supplementary affidavit (or set of affidavits);

- a. by a person who has been involved directly in the recovery of the alleged debt from the respondents and who confirms the current status of the debt;
- b. which also contains either direct evidence dealing with the aspect of rectification by the bank officials involved, failing which evidence that complies with the requirements for admissibility under the Civil Proceeding Evidence Act 25 of 1965, the Electronic Communications and Transactions Act 25 of 2002 or the Law of Evidence Amendment Act 45 of 1998 (as the case might be);
- c. by the responsible person at the applicant's firm of attorneys who can attest that the section 120 notices were written and despatched to the sheriff;
- d. The matter is postponed sine die.

SPILG, J

DATE OF JUDGMENT:	23 May 2016
REVISED:	25 May 2016
FOR APPLICANT:	Adv V Fine
	Jason Michael Smith Inc
FOR RESPONDENT:	Unopposed